ASSIGNMENT OF WAGES TO BE EARNED IN THE FUTURE IN THE ABSENCE OF A CONTRACT OF EMPLOYMENT DEFINITE AS TO TIME.—The question presented to the Supreme Court of Ohio in *Rodijkeit* v. *Andrews* (1906), 74 O. S. —, 77 N. E. Rep. 747, was whether an assignment of wages executed by Rodijkeit was a good conveyance at law of the wages earned by the assignor in the service of the L. S. & M. S. Ry. Co., between the 1st and the 25th days of January, 1905.

A copy of the assignment is as follows:—

"To the Paymaster, L. S. & M. S. R. R.:

Dear Sir—For value received, I hereby assign seventy-five 00-100 dollars from the amount now due me, for services rendered the L. S. & M. S. R. R. or any other railway, firm or person wherever I may be employed as switchman and you are hereby authorized to pay the above amount to P. L. Andrews, or his order, and deduct the same in settlement with me.

No. ———— (Signed) T. RODIJKEIT."

Rodijkeit demurred to the answer of P. L. Andrews and thereby admitted the existence of the above assignment and the additional facts averred in Andrews' answer: "On the twenty-second day of April, 1904, the said plaintiff was in the employ of said defendant, The Lake Shore & Michigan Southern Railroad Company, and so remained in the employ of said defendant continually up to the twenty-fifth day of January, 1905; that on the twenty-second day of April, 1904, said plaintiff, for a valuable consideration, assigned to defendant, P. L. Andrews, out of the wages then due or to become due from said defendant company, the sum of $75.00, and that there is now due this answering defendant on said assignment, a copy of which is hereto attached and marked Exhibit A, and made a part hereof, the sum of forty-five and 60-100 dollars."

The rule laid down by the court is expressed in the following paragraph and supported by the cases cited:

"The question presented is the right of a person in the employment of another, in the absence of a contract for a definite time of employment, to assign future earnings from such employment.

"It is well settled that a mere expectancy or possibility is not assignable at law, consequently wages to be earned in the future, not under an existing engagement but under engagements subsequently to be made, are not assignable. If there is an existing employment, under which it may reasonably be expected that the wages assigned will be earned then the possibility is coupled with an interest and the wages may be assigned. *Mallin* v. *Wenham*, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; *Metcalf* v. *Kincaid*, 87 Ia. 443, 54 N. W. 867, 43 Am. St. Rep. 391; *Peterson* v. *Ball*, 121 Ia. 544, 97 N. W. 79; *Bell* v. *Mulholland*, 90 Mo. App. 612; *Manly* v. *Bitzer*, 91 Ky. 596, 16 S. W. 464, 34 Am. St. Rep. 242; *Schilling* v. *Mullen*, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; *Augur* v. *N. Y. B. & P. Co.*, 39 Conn. 536; *Garland* v. *Harrington*, 51 N. H. 409; *Mulhall* v. *Quinn*, 1 Gray (Mass.) 105, 61 Am. Dec. 414; *Hartley* v. *Tapley*, 2 Gray (Mass.) 565; *Brackett* v. *Blake*, 7 Metc. (Mass.), 335, 41 Am. Dec. 442; *Low* v. *Pew*, 108 Mass. 347, 11 Am. Rep. 357; *Lighbody* v. *Smith*, 125 Mass. 51;

O'Keefe v. *Allen,* 20 R. I. 414, 39 Atl. 752, 78 Am. St. Rep. 884; *Dolan* v. *Hughes,* 20 R. I. 513, 40 Atl. 344, 40 L. R. A. 736; *Thayer* v. *Kelsey,* 28 Vt. 19, 65 Am. Dec. 220."

The only decision of the Supreme Court of Ohio, previous to the principal case, bearing on the question, is found in *Grant* v. *Ludlow,* 8 O. S., p. 38, par. 6, where the following rule is laid down:

"Whatever choses in action are transmissible by operation of law are assignable in equity. The rule stated by STORY, J., in *Comegys et al.* v. *Vasse,* 1 Pet. 213, is undoubtedly correct and has been acted upon in the State of New York in determining what assignees may sue as plaintiffs under their code, 'in general it may be affirmed that mere personal torts which die with the party and do not survive to his personal representatives, are not capable of passing by assignment;' and that vested rights *ad rem* and *in re* possibilities coupled with an interest and claims growing out of and adhering to property may pass by assignment." (*Robinson* v. *Weeks,* 6 How. Pr.) 161; *Hall* v. *Robinson,* 2 Comst. 294; *Hoyt* v. *Thompson,* 1 Selden 347.)

The rule laid down in *Grant* v. *Ludlow* is consistent with the old established authorities on the question as to what property and rights are assignable at law. *Mitchell* v. *Winslow,* 2 Story 630; *Low* v. *Pew,* 108 Mass. 349.

While the court has Illinois, Iowa and Michigan decisions of comparatively recent date to substantiate its position, it would seem nevertheless that the rule laid down is illogical in the first place and incompatible with the old and long established rules of law which determine what rights and property are assignable, or may be sold at law.

The leading case on this question, *Low* v. *Pew et al.,* 108 Mass. 347, WILLISTON'S SELECTED CASES ON SALES, p. 2, lays down the rule:

"It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold, but a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth or increase. Having such interest, the right to the thing sold, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon the land in which he has no interest. 2 KENT COM. (10th ed.) 468; *Jones* v. *Richardson,* 10 Met. 481; *Bellows* v. *Wells,* 36 Verm. 599; *Van Hoozer* v. *Cory,* 34 Barb. 9.

The same principles have been applied by this court to the assignment of future wages or earnings in *Mulhall* v. *Quinn,* 1 Gray 105; an assignment of future wages, there being no contract of service, was held invalid. In *Hartley* v. *Tapley,* 2 Gray, 565, it was held that if a person is under a contract of service he may assign his future earnings growing out of such contract. The distinction between the cases is, that in the former the future earnings are a mere possibility coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest and the right

to have, though contingent, and liable to be defeated, is a vested right. In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut; but it was a mere possibility and expectancy coupled with no interest. We are of the opinion that they had no actual or potential possession of, or interest in, the fish; and that the sale to the plaintiffs was void.

The plaintiffs rely upon *Gardner* v. *Hoeg,* 18 Pick. 168, and *Tripp* v. *Brownell,* 12 Cush. 376. In both of these cases it was held that the lay or share in the profits, which a seaman in a whaling voyage agreed to receive in lieu of wages, was assignable. The assignment in each case was, not of any part of the oil to be made, but of the debt which under the shipping articles would become due to the seaman from the owners at the end of the voyage. The court treated them as cases of assignments of choses in action. The question upon which the case at bar turns did not arise, and was not considered."

It is contended that the mere allegations of an "existing employment, under which it may reasonably be expected that the wages to be assigned will be earned," is not such an interest, vested or otherwise, as is contemplated by the law as laid down in *Low* v. *Pew,* 108 Mass., and *Grant* v. *Ludlow,* 8 O. S., as will connect the possibility that the assignor in the principal case might earn wages the following January, with an interest, thereby giving him the right to sell the same the preceding April unless he were under a contract of employment covering the entire period within which the wages, attempted to be assigned, could be earned.

The court admits that if Rodijkeit was not employed at the time the assignment was executed, then the possibility of his earning wages in the future was not coupled with an interest, such as is contemplated by the law in *Grant* v. *Ludlow* and *Low* v. *Pew.* Moreover, inasmuch as the general condition of laborers is to be engaged in earning wages, the mere fact that a laborer is employed at will, does not strengthen the possibility of earning wages nine months in the future any more than if he were not so engaged. But, if he has a contract of employment for a fixed time or an indefinite period, for stipulated wages, such that in the case of a *breach of the contract, an action for damages would lie,* then and then only, is the possibility of earning wages in the future coupled with such an interest as is contemplated by the law, in *Grant* v. *Ludlow, Low* v. *Pew* and *Belding* v. *Read,* 3 Hurl., and Coltman's Rep. 961.

It should be further remarked that *Low* v. *Pew, Lightbody* v. *Smith* and *Brackett* v. *Blake, Hartley* v. *Tapley,* cited by the court above, do not support the rule laid down by the Supreme Court of Ohio; on the contrary, the court says in *Lightbody* v. *Smith:*

"AMES, J. It may have been the expectation of all the parties concerned, at the time the advances were made to Lightbody, that he would continue in the employ of the defendants long enough for his wages to repay those advances. But there was no stipulation to that effect. On the contrary, his employment was by the day, and from day to day only. They had a right to discharge him at any moment; and he had a right to seek employment

elsewhere whenever he saw fit. Except as to wages actually due him at the time of the assignment, it was an attempt to transfer a mere possibility of future earnings and not an existing chose in action." (*Mulhall* v. *Quinn,* 1 Gray, 105; *Twiss* v. *Cheever,* 2 Allen, 40; *Brackett* v. *Blake,* 7 Met. 335; *Low* v. *Pew,* 108 Mass. 347, 350.)

It is admitted that by the assignment in the principal case Rodijkeit has contracted to pay Andrews $75.00 but the *real question before the court* is when (if at all) would the title to wages earned by Rodijkeit at some future time (in this case, Jan. 1st to 25th, 1905) pass to Andrews. The assignee could not acquire under the assignment any greater right to the wages than Rodijkeit could have and he could not sue on April 22nd, 1904, the date of the assignment, for wages earned during January, 1905.

The assignment could not be enforced in equity because in an employment at will the employee could quit or the employer could discharge him without creating any liability, and thus defeat any attempt of a court of equity to enforce specific performance of such a contract. (*Fairgraves* v. *The Lehigh Navigation Co.,* 2 Phil. Rep. p. 184-7).

Moreover, in the cases of the sales of wool to be grown on one's own sheep and of crops to be grown on one's own land, the will of no one could interfere with the maturing the fleece of wool or of the crop without creating a liability for which the one, interfering with the same, must answer.

In order that A may assign or sell personal property he must have in him the title of the property or the title to a part of the property, out of which the property attempted to be assigned or sold is the growth or increase by acumulation or addition, at the time he executes his assignment or grant of the property.

"It is an elementary principle of law of sales, that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. Thus it has been held that a mortgage of goods which the mortgagor does not own at the time the mortgage is made, though he afterwards acquires them, is void. *James* v. *Richardson,* 10 Met. 461. The same principle is applicable to all sales of personal property. *Rice* v. *Stone,* 1 Allen, 566, and cases cited. *Head* v. *Goodwin,* 37 Maine, 181." *Low* v. *Pew,* 108 Mass. 349.

Therefore, such an assignment, with respect to wages to be earned in the future, is nothing more than a contract to sell the wages when they are earned, and in case of a breach of the contract an action for damages only would lie, just as in the case of a contract for the sale of property for future delivery.

In the case of *Dred Scott* v. *Sanford,* 19 How. U. S., the majority of the Supreme Court erred in passing on the property rights in slaves when held in free states, in not following the rules of law established in the free and slave states, in the old English cases and those of the civil law rather than following those cases decided in slave states. So here the writer thinks that the court erred in breaking away from the old rules of law as laid down in the earlier cases, thereby establishing or tending to establish a condition of industrial slavery by declaring it to be the law that a man may sell for a consideration his future earnings for any number of years, to-wit, for life.

JAS. HARRINGTON BOYD.